DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-40/50742

PRELIMINARY RECITALS

Pursuant to a petition filed October 1, 2001, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regards to the denial of Medical Assistance and a request to re-allocate assets, a hearing was held on November 7, 2001, at Milwaukee, Wisconsin.

The issue for determination is whether petitioner's assets may be allocated to his community spouse.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	Represented by:
(petitioner)	Attorney Rollie R. Hanson Law Office of Rollie R. Hanson 600 East Mason St #100 Milwaukee, WI 53202-3831

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Madelaine Lass, ESS
James Schroeder, ESS I
Milwaukee County Dept Of Human Services
1220 W. Vliet St, 3rd Floor
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an institutionalized resident of Milwaukee County; he applied for Institutional – MA on July 30, 2001.

2. On February 16, 2001, the petitioner and his wife jointly owned two accounts at the Wells Fargo Bank in Nevada, apparently, in Henderson, Nevada; a savings account with a balance of $118,793.10 (Acct #A), and a checking account with a balance of $2,286.84(Acct #B). On that

date, they closed these accounts and transferred all these funds to a Wells Fargo Bank branch in West Allis, Wisconsin. Subsequently soon after on a date unknown, they relocated to Wisconsin.

3. On February 20, 2001, at the West Allis bank branch, the petitioners opened a savings account (#D) with an initial balance of $118,793.10; and a checking account (Acct #E) with an initial balance of $2,286.84. See, Exhibits #2, #3, #4 & #6.

4. On February 21, 2001, the petitioners transferred $25,000 in cash from the new West Allis bank savings account described in Finding #3 to the new West Allis bank checking account described in Finding #3.

5. On February 22, 2001, Check #094 for $25,000 was posted against the checking account described in Findings #3 & #4, above. The petitioners had transferred this amount by draft to their adult daughter and her husband. The (petitioner daughter) live in Milwaukee, Wisconsin. See, Exhibit #6, attached February 26, 2001, Account Statement for #E. This transaction left a balance in the new savings account of $93,893.97 on February 28, 2001. See, Exhibit #4, February 28, 2001, Account Statement for #E.

6. On April 16, 2001, the petitioner and his wife transferred a second $25,000 in cash from the new West Allis bank savings account described in Finding #3 to the new West Allis bank checking account described in Finding #3. This transaction left a balance in the new savings account of $69,533.49 on April 30, 2001. See, Exhibit #4, attached April 30, 2001, Account Statement for #D; see also, Exhibit #6, attached April 24, 2001, Account Statement for #D.

7. On April 17, 2001, Check #1154 for $25,000 was posted against the checking account described in Findings #3 & #4, above. The petitioners again had transferred this amount by draft to their adult daughter and her husband. See, Exhibit #6, attached April 24, 2001, Account Statement for #E.

8. On May 10, 2001, the petitioners transferred $5,000 from the savings account #E into a newly created and separate savings account held jointly by the wife and daughter as POA, (Acct #F); and they then also transferred $45,000, on May 14, 2001, from the savings account #E into a newly created joint savings account held by wife and daughter/POA, (Acct #G), apparently on the advice of a nursing home in which it was expected the petitioner would be moving into soon. See, Exhibit #5, attached May 31, 2001, Account Statement for #F; see also, Exhibit #4, attached May 31, 2001, Account Statement for #E.

9. On May 23, 2001, the petitioner was first institutionalized in a nursing home, and the spouse sought legal advice from a private attorney. Pursuant to the advice given by the attorney, the (petitioner) returned the second $25,000 gift described in Findings #6 & #7, to the petitioner's wife, and these funds were put back in the initial saving account (#E) on May 25, 2001. In addition, the petitioner's wife and daughter closed the new joint saving account (Acct #G) they had just created (as described in Finding #8, above), and transferred *back* to the initial joint savings account (#E)(titled in the name of petitioner and spouse), the balance from the new joint savings account (created in the name of the spouse and POA/daughter), in the amount of $50,051.80, on May 25, 2001, as described in Finding #8. See, Exhibit #4, attached May 31, 2001, Account Statement for #E; see also, Exhibit #5.

10. On May 23, 2001, the petitioner and his wife had a jointly owned liquid assets in the Wells Fargo Bank - West Allis totaling $92,624.53. They also owned an "accidental death and dismemberment" life insurance policy with no cash value. See, Exhibits #4, #6 & #7.

11. After the application of July 30, 2001, the petitioner's wife executed a post-hoc written agreement with her daughter agreeing that the wife was obligated to pay the daughter $925 per month, retroactive to February 1, 2001, as rent and payment for cares provided to her by (daughter) and her family. See, Exhibit #8.

12. The county worker assigned to the petitioner's application of July 30, 2001, subsequently attempted to verify assets and income for the petitioner and his wife, but due to the dizzying sequence of transactions described above, she had great difficulty in doing so. Ultimately, on August 30, 2001, she concluded that the petitioners had countable non-exempt liquid assets totaling $90,548.29, and that they had divested approximately $50,000. See, Exhibit #9. She did not, however, issue a written Notice of Decision to the petitioner informing him that he had been denied due to excess assets; rather, she "suppressed" this Notice. See, Exhibit #1. Also, no notice was ever issued concerning any divestment determination against the petitioner.

13. On October 1, 2001, the petitioner filed an appeal with the Division of Hearings & Appeals seeking to have an administrative law judge re-allocate the couple's joint assets to his wife, and to have himself made eligible for Institutional – MA. At the hearing, the petitioner's attorney asserted that the petitioner was seeking coverage retroactive to August 1, 2001.

14. The petitioner receives monthly income in his name of $1,168 in Social Security cash benefits, plus $287.67 in a pension, for a total income solely in his name of $1,453.67. The community spouse receives monthly income in her name of $959 in Social Security cash benefits, plus $207.20 in a pension, for a total income solely in her name of $1,166.20.

15. The two Wells Fargo Bank accounts described in Findings #3 & #10 are interest-bearing accounts currently generating about $190 per month of interest income to the petitioner and his wife, jointly.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home (or in the community pursuant to MA Waiver eligibility) and that person has a "community spouse" who is not institutionalized (or eligible for MA Waiver services.) WI Stat § 49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. WI Stat § 49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

In this case, the county never determined the current asset allowance for this couple because the worker was unsure just how much the couple owned in countable assets due to some pre-application transfers of funds, at least one of which was probably a divestment of approximately $25,000. In addition, another $25,000 was transferred and then returned, which would apparently cure the second divestment. Finally, $50,000 was taken from one account, placed in newly created joint account set up by, and titled in, the petitioner's wife and her the daughter as POA, and then returned to the first account owned by the petitioner and his wife. As a result of the worker's understandable uncertainty as to what these folks were doing with their assets, no Notice of Decision was ultimately generated and issued that clearly denied the petitioner's application for assets in excess of the asset allowance because she could not determine what the asset

allowance amount was here. Nor did she ever officially make a divestment determination or issue notice of the same.

The petitioner's attorney presented detailed bank statements at the hearing establishing that couple's countable liquid assets for the couple at the time of institutionalization totaled $92,624.53. See, Exhibits #3, #4, #5, #6 & #7. The agency representative was unaware of any other assets besides the checking account, savings account, and life insurance assets that comprise this total value, and the petitioner's daughter, and her husband, indicated at the hearing that these were the total assets held by the petitioning couple.

This being the case, the appropriate asset allowance applicable here is $50,000. See, MA Handbook, App. 23.4.2, which is based upon WI Stat § 49.455(6)(b). $2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy, i.e., the asset limit is accordingly, $52,000. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a *general* rule the spouse is not MA eligible.

As an *exception* to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance in this case was $1,935 in May, 2001. MA Handbook, Appendix 23.6.0 (5-1-01).

WI Stat § 49.455(6)(b)3 explains this process, and subsection (8)(d) provides in its pertinent part as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

Based upon the above, a hearing examiner can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

Subsection (8)(d) quoted above includes a final sentence that requires the institutionalized spouse to make his or her income available to the community spouse before the assets are allocated. However, the Wisconsin Court of Appeals, in Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, 615 N.W. 2d 647, concluded that the final sentence violated the mandate of the federal MCCA law. The Blumer court held that the hearing examiner first must allocate resources to maximize the community spouse's income, and only if the resources' income does not bring the community spouse's income up to the monthly minimum can the institutionalized spouse's income be allocated. The Blumer decision is on appeal to the United States Supreme Court, but currently it is the law that must be followed.

The result in this case is as follows. Petitioner's wife's sole monthly income is $1,166.20. Allocating all of the assets to her adds interest income averaging $190 per month, thus bringing monthly income to $1,356.20. Since the total is below $1,935, the result is that all of the couple's non-exempt assets are re-allocated to petitioner's wife. *Barring any divestment impediment to eligibility*, this would make the

petitioner asset eligible for Institutional – MA. The matter must be remanded to the county agency for re-processing, *including* whether any divestment penalty period prohibits eligibility for any period of time. That separate issue is not before me because the agency did not take the divestment action, nor did the petitioner appeal such an issue.

In the event of eligibility, the county would then reallocate some or all of petitioner's sole income to his wife when it determines his monthly cost of care under MA rules. Finally, if this occurs, and if the community spouse desires an income allocation above the minimum monthly needs allowance as indicated at the hearing by her attorney, she will have to file a *new* appeal at the time the agency makes the income allocation, contesting that separate agency determination, and seeking an increase in the allowance to an amount above the minimum monthly needs allowance from the administrative law judge then-assigned to that new appeal, as provided under WI Stat § 49.455(8).

CONCLUSIONS OF LAW

All of the non-exempt assets of petitioner and his wife described in Finding #10, above, must be allocated to his wife to maximize her monthly income.

NOW, THEREFORE, it is ORDERED

That the matter be remanded to the county with instructions to increase the community spouse's asset share to $92,624.53 as of May 23, 2001, and to determine petitioner's MA eligibility retroactive to August 1, 2001, (Note: per Finding of Fact #13, above) based upon the new community spouse asset allocation and/or whether any divestment bars eligibility for any period subsequent. The county shall do so within 20 days of this decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this15th day of November, 2001

/sKenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
71/KDD